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**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

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<b>APPLICATION TO CHANGE WATER RIGHT NO. 76F 30148159 BY IFG-KAMP LLC</b>	}	<b>PRELIMINARY DETERMINATION TO GRANT CHANGE</b>
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On April 6, 2020, IFG-Kamp, LLC (Applicant) submitted Application to Change Water Right No. 76F 30148159 to change Water Right Claim No. 76F 30122599 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated September 17, 2020. The Applicant responded with information dated September 28, 2020. The Application was determined to be correct and complete as of November 18, 2020. An Environmental Assessment for this Application was completed on March 18, 2021.

**INFORMATION**

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application to Change Water Right, Form 606
- Attachments
- Maps:
  - Aerial photo dated 7/17/2017 depicting historic use and related child rights
  - Aerial photo dated 7/17/2017 depicting historic use of subject right
  - Aerial photo dated 7/2018 depicting place of use for marketing for mitigation
  - Aerial photo dated 10/26/2017 depicting place of use and point of diversion for mitigation place of use
  - Aerial photo dated 7/2018 depicting place of use for mitigation and marketing for mitigation

- Change in Purpose Addendum

Information within the Department's Possession/Knowledge

- Water Right Claim File No. 76F 116477-00 (Parent Right)

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- Water Right Claim File No. 76F 30122599 (Child Right)
- Change Application File Nos. 76F 30002261, 76F 30066512, 76F 30103180 and 76F 30110085
- Missoula County Warranty Deed Book 1012, Page 1300, dated May 24, 2019, showing conveyance of a portion of statement of claim 76F 116477-00 to the Applicant in the amount of 2,941 acre-feet diverted volume, 500 acre-feet consumed volume and 4.07 cfs flow rate.
- The Department also routinely considers the following information. The following information is not included in the administrative file for this Application, but is available upon request. Please contact the Missoula Regional Office at 406-721-4284 to request copies of the following documents.
  - John Tubbs - May 1, 2009 Memorandum - Permitting in the Open Clark Fork and Flathead Basins

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA).

## **WATER RIGHT TO BE CHANGED**

### **FINDINGS OF FACT**

1. Applicant seeks to change statement of claim No. 76F 30122599. This claim is for 4.07 cubic feet per second (CFS) up to 2,941 acre-feet (AF) of diverted volume from the Blackfoot River for the purpose of industrial from January 1 to December 31, annually, with a priority date of December 11, 1904. The claimed point of diversion is a pump located in the SWNWNW of Section 22, T13N, R18W, Missoula County. The claimed place of use for industrial is the historical Bonner lumber mill located in the N2S2NE and N2SE of Section 21, and the NW and W2NWSW of Section 22, all in T13N, R18W, Missoula County. This statement of claim is one of five child rights split off of the original parent right 76F 116477-00. Elements of the water right proposed to be changed are presented in the following table:

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Table 1: Water Right Proposed For Change

W.R. NO.	FLOW	VOLUME	PURPOSE	PERIOD OF USE	PLACE OF USE	POINT(S) OF DIVERSION	PRIORITY DATE
76F 30122599	4.07 cfs	2941 AF	Industrial	01/01 12/31	Sec 21 & 22, T13N, R18W	SWNWNW Sec 22, T13N, R18W	12/11/1904

2. Statement of claim 76F 30122599 represents a portion of the parent right statement of claim 76F 116477-00. The Applicant was sold a portion of the parent right and filed a Form 641 Ownership Update Divided Interest with the Department on July 2, 2019 that was forwarded to the Montana Water Court. The Montana Water Court established case number 76F-S1 and issued an Order Amending and Adopting Master's Report on March 17, 2020 that created child right numbers 76F 30122597, 76F 30122598 and 76F 300122599, owned by UFP Real Estate LLC, IDC Holdings LLC and IFG-Kamp, LLC respectively. The following table shows the current parent and child rights:

Table 2: Parent Right 76F 116477 and Split Child Rights

W.R. No.	Owner	W.R. Version Type	Flow Rate	Volume	Purpose
76F 116477	Bonner Property Development	Split Post Decree	15.39 CFS	5936.2 AF	Industrial
76F 30110719	K3 LLC	Change Authorization	1.38 CFS	1000 AF	Industrial Commercial Irrigation
76F 30110749	Flying Colors Group LP	Change Authorization	1.11 CFS	252 AF	Marketing for Mitigation
76F 30122597	UFP Real Estate LLC	Original Right	1.59 CFS	673 AF	Industrial
76F 30122598	IDC Holdings LLC	Original Right	318.67 GPM	298 AF	Industrial
76F 30122597	IFG-Kamp LLC	Original Right	4.07 CFS	2941 AF	Industrial

3. There are no water rights supplemental to statement of claim 76F 30122597. There are several water rights that have overlapping places of use with the original parent claim, 76F 116477-00. These water rights supplied water to various aspects of the mill operation, however

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they did not supply an alternative source of water for the industrial uses described in 76F 116477-00, and therefore are not considered supplemental by the Department. These water rights are not included as a part of this change and are not owned by the Applicant; however, statement of claim no. 76F-116475-00 has a flow rate of 20 GPM and shares a point of diversion, one of the two wells, with statement of claim no. 76F-116477-00. The two wells identified for statement of claim no. 76F-116477-00 are manifold together and collectively provide 1,700 GPM; one well produces 1,100 GPM and another produces 600 GPM, under which the 20 GPM flow rate for 76H-116475-00 is withdrawn and is not included as a part of this change. Elements of the overlapping water rights are presented in the following table:

**Table 3: Water Rights With Overlapping Places of Use With 76F 116477-00**

WATER RIGHT NO.	FLOW RATE	PURPOSE	PERIOD OF USE	PLACE OF USE	POINT OF DIVERSION	SOURCE	PRIORITY DATE
76F 116473 00	200 GPM	Commercial	1/1 – 12/31	Sections 21 and 22, T13N, R18W	NESWNW Section 22, T13N, R18W	Groundwater	12/31/1942
76G 116474 00	100 GPM	Commercial	1/1 – 12/31	Sections 21 and 22, T13N, R18W	NWNESE Section 21, T13N, R18W	Groundwater	6/28/1973
76F 116475 00	20 GPM	Industrial	1/1 – 12/31	Section 22, T13N, R18W	SENWNW Section 21, T13N, R18W	Blackfoot River	10/16/1958
76F 116476 00	185 GPM	Industrial	1/1 – 12/31	Sections 21 and 22, T13N, R18W	NWSWNW Section 22, T13N, R18W	Groundwater	12/31/1895

4. On March 2, 2015, Change Authorization No. 76F-30066512-00 was issued for statement of claim No. 76F-116477-00. The authorization permanently changed one of the three points of diversion from a well located in the SWNWNW of Section 22, T13N, R18W, Missoula County to another well located in the same legal land description, 250-feet southeast of the existing well. This was done per an Administrative Order on Consent issued by the Department of Environmental Quality (DEQ) on April 19, 2010, requiring the removal and disposal of polychlorinated biphenyl laden soils underneath the well house. The project completion notice for this change was received on March 30, 2017 and the change was verified on April 3, 2017.

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5. On October 12, 2017, Change Authorization No. 76F-30103180 was issued for statement of claim No 76F-116477-00. The authorization added two points of diversion and the purposes of irrigation and commercial to the portion of the water right that was deeded to K3 LLC for use in a brewery, tap room, concert venue and other commercial operations. This change allowed K3 LLC to relocate their portion of the flow rate and diverted volume currently associated with a surface water pump on the Blackfoot River in the SWNWNW of Section 22, T13N, R18W, to two wells located approximately 0.4 miles upstream in the SENENW of Section 22, T13N, R18W, Missoula County. The Montana Water Court also created a child right for K3 LLC's portion of claim number 76F 116477 on October 26, 2017. This child right is identified as statement of claim 76F 30110719, and the change authorization information was transferred in DNRC's database to this new claim number.

6. On May 14, 2018, Change Authorization No. 76F 30110085 was issued for statement of claim no. 76F 30110749, which is a child right split from parent right 76F 116477-00. This authorization changed the purpose of the portion of 76F 116477-00 deeded to FM LLC, in the amounts of 1.11 CFS flow rate, 252 AF diverted volume and 42.84 AF consumed volume to marketing for mitigation. The place of use for marketing for mitigation is from the claimed point of diversion on the Blackfoot River downstream to the Clark Fork River and ultimately to Noxon Dam in Sanders County. The historically consumed 42.82 AF is the amount of mitigation available through this change authorization.

## **CHANGE PROPOSAL**

### **FINDINGS OF FACT**

7. The Applicant proposes to change the purpose, place of use and add a point of diversion to statement of claim no. 76F-30122599. The proposed change in purpose is from industrial to mitigation and marketing for mitigation. The additional point of diversion is located instream, and is being added to denote the upstream reach of the proposed mitigation place of use. The Applicant purchased 4.07 CFS flow rate, 2,941 AF diverted volume and 500 AF of consumed volume of statement of claim no. 76F 116477-00 from Bonner Property Development, LLC on May 24, 2019, evidenced in a Warranty Deed found in Book 1012 Page 1300 in Missoula County. Of this amount the Applicant proposes to change 0.56 CFS flow rate, 401.2 AF diverted volume and 68.2 AF consumed volume to mitigation. This mitigation water is required to offset surface water depletions in the Clark Fork River resulting from groundwater pumping

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permitted in water right no. 76M 30122112. This permit was granted by the Department on August 13, 2020 for the industrial use of log spraying at a lumber mill in St. Regis, Montana. The remaining portion of statement of claim 76F 30122599 is proposed to be changed to marketing for mitigation in the amounts of 3.51 CFS flow rate, 2,539.8 AF diverted volume and 431.8 AF consumed volume. The subject water right will no longer be used for the originally claimed purpose of industrial use at the historical Bonner Lumber Mill.

8. The place of use for mitigation will be the location where depletions to the Clark Fork River occur, described as the NE of Section 19, T18N, R27W, Mineral County and downstream in the Clark Fork River to the location of Noxon Dam. The place of use for marketing for mitigation will be from the claimed point of diversion on the Blackfoot River in the SWNWNW of Section 22, T13N, R18W, Missoula County to the confluence with the Clark Fork River and downstream in the Clark Fork River to the location of the Noxon Dam in Sanders County, described as the S2S2 of Section 33, T26N, R32W, Sanders County. The marketing for mitigation will provide mitigation water in the lower Blackfoot river, located in the Upper Clark Fork Basin Closure area and the Clark Fork River in basins 76M and 76N.

9. The proposed additional point of diversion for the purpose of mitigation is located in the SENENE of Section 19, T18N, R27W, Mineral County. The additional point of diversion will be instream, and is the location of where depletions from groundwater pumping associated with provisional permit 76M 30122112 occur in the Clark Fork River, and denotes the upstream reach of the mitigation place of use.

### **CHANGE CRITERIA**

10. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶¶ 8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that

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the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

11. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. *E.g., Hohenlohe*, at ¶¶ 29-31; *Town of Manhattan*, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

## **HISTORIC USE AND ADVERSE EFFECT**

### **FINDINGS OF FACT - Historic Use**

12. Statement of claim 76F 30122599 was created from the originally filed claim, 76F 116477-00 by the Montana Water Court. The historical use for 76F 30122599 was established during the analysis of statement of claim No. 76F-116477-00 during previous change authorizations. Statement of Claim 76F 116477-00 was decreed by the Montana Water Court in basin 76F with a flow rate of 24.25 CFS and a volume of 11,102.2 AF for industrial use. Through the Department's analysis, the actual historical use was found to be a flow rate of 17.68 CFS and a diverted volume of 7,481 AF for the purpose of year-round industrial use. The historical consumed volume was found to be 17% of the historically diverted volume, which is

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1,271.8 AF. Prior to July 1, 1973, water was diverted from the Blackfoot River using a dam and a pump, as was decreed by the Montana Water Court.

13. Through analysis provided in Change Authorization No. 76F-30066512, the Department finds that the historical place of use for water right 76F-116477-00 includes the industrial site south of the Blackfoot River and 14 acres of lawn and garden south and east of the industrial site at the Bonner School and residential areas associated with Bonner Mill site. The Applicant does not own any land associated with the historical place of use.

14. For this application the Applicant agreed with the historical use analysis completed by the Department in Change Application No. 76F-30066512. The Applicants portion of statement of claim 76F 116477-00 is 4.07 CFS, 2,941 AF diverted volume and 500 AF consumed volume, matching the historical use analysis performed for 76F 116477-00 and the 17% of historically diverted volume consumed. Historical consumptive use was calculated using a 17% coefficient for lumber and wood products found in Appendix 2 of the U.S. Geological Survey Scientific Investigations Report 2007-5197 titled "Consumptive Water-Use Coefficients for the Great Lake Basin and Climatically Similar Areas". Through the analysis provided in Change Authorization No. 76F-30066512, the Department found the following historical consumptive use for Statement of Claim Nos. 76F-116477-00 and 76F-30122599:

Table 4: Historical Use 76F 116477-00 and 76F 30122599

<u>STATEMENT OF CLAIM NO.</u>	<u>SOURCE</u>	<u>PRIORITY DATE</u>	<u>FLOW RATE</u>	<u>DIVERTED VOLUME</u>	<u>CONSUMPTIVE USE</u>
76F-116477-00	Blackfoot River	12/11/1904	7,933 GPM	7,481 AF	1,271.8 AF
Applicant's Portion of Statement of Claim No. 76F-116477-00					
<u>STATEMENT OF CLAIM NO.</u>	<u>SOURCE</u>	<u>PRIORITY DATE</u>	<u>FLOW RATE</u>	<u>DIVERTED VOLUME</u>	<u>CONSUMPTIVE USE</u>
76F-30122599	Blackfoot River	12/11/1904	4.07 CFS	2,941 AF	500 AF



*FINDINGS OF FACT – Adverse Effect*

15. Applicant seeks to change the purpose and place of use of statement of claim 76F 30122599. Upon authorization of the change, 4.07 CFS up to 2,941 AF will no longer be diverted from the Blackfoot River for industrial purposes. Water will be left instream for the purposes of mitigation and marketing for mitigation. Mitigation in the amounts of 0.56 CFS, 401.2 AF diverted volume and 68.2 AF consumed volume will be left instream to offset depletions to the Clark Fork River caused by groundwater pumping for industrial log spraying at a lumber mill in St. Regis. Mitigation requirements in the amount of 0.56 CFS, 401.2 AF diverted and 68.2 AF consumed volume was found necessary to offset calculated adverse effect to Avista Corporation's Clark Fork River hydropower water rights during the processing of provisional permit no. 76M 30122112. The Applicant also proposes to change the remainder of their portion of the historical water right to marketing for mitigation, in the amounts of 3.51 CFS, 2,539.8 AF diverted and 431.8 AF consumed. The mitigation plan will replace future depletions from the Blackfoot River in the reach between the historical point of diversion and the former Milltown Dam site, and the Clark Fork River from the former Milltown Dam site to the hydropower dam in Noxon. At the point that the Applicant markets the mitigation water to a future appropriator, the depletions of a future appropriator must occur within one of these stream reaches for the marketing for mitigation water to be effective.

16. Following the conversion of water from industrial uses to mitigation and marketing for mitigation, the historically diverted flow rate and volume of 4.07 CFS and 2,941 AF will remain in the Blackfoot River and accrue downstream to the Clark Fork River and the hydropower dam in Noxon. Reducing the diverted flow rate and volume at the historical pumpsite for the purposes of mitigation and marketing for mitigation ensures that no adverse effect will result from changing the purpose and point of diversion for the water right due to the fact that the pump site was decommissioned and will no longer be used to divert water out of the Blackfoot River. The original parent right, 76F 116477-00, was reduced by the amounts sold to the Applicant and that water can no longer be diverted for industrial purposes at the Bonner Mill site.

17. The Department finds historic consumptive use for the Applicants deeded portion of 2,941 AF historic diverted volume to be 500 AF. The proposed consumptive use for mitigation and

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marketing for mitigation will be 500 AF, with the consumptive use being used to replace surface water depletions caused by the groundwater use authorized by provisional permit 76M 30122112 and future depletions from other unknown appropriations that will require mitigation water to be purchased from the Applicant. Per the Department's analysis, the consumptive use is unchanged and no expansion will occur as a result of authorization of this proposed change in water use.

## **BENEFICIAL USE**

### **FINDINGS OF FACT**

18. Applicant seeks to change the purpose, place of use and add a point of diversion to statement of claim 76F 30122599. Upon authorization of the change, 4.07 CFS up to 2,941 AF will no longer be diverted from the Blackfoot River for industrial purposes. Water will be left instream for the purposes of mitigation and marketing for mitigation. Mitigation in the amounts of 0.56 CFS, 401.2 AF diverted volume and 68.2 AF consumed volume will be left instream to offset depletions to the Clark Fork River caused by groundwater pumping for industrial log spraying at a lumber mill in St. Regis. Mitigation requirements in the amount of 0.56 CFS, 401.2 AF diverted and 68.2 AF consumed volume was found necessary to offset calculated adverse effect to Avista Corporation's Clark Fork River hydropower water rights during the processing of provisional permit no. 76M 30122112. The Applicant also proposes to change the remainder of their portion of the historical water right to marketing for mitigation, in the amounts of 3.51 CFS, 2,539.8 AF diverted and 431.8 AF consumed.

19. The place of use for marketing for mitigation is from the historical point of diversion in the Blackfoot River located in the SWNWNW of Section 22, T13N, R18W, Missoula County downstream to the confluence with the Clark Fork River and then downstream to Avista Corporation's Clark Fork River hydropower rights in the S2S2 of Section 33, T26N, R32W, Sanders County. The place of use for mitigation is the location of depletions from groundwater pumping authorized in provisional permit 76M 30122112, described as the NE of Section 19, T18N, R27W, Mineral County.

20. The need for mitigation water in Blackfoot River basin is supported by the Upper Clark Fork River Basin Legislative Closure that requires an augmentation plan for replacing surface water depletions caused by groundwater pumping. The Department recognizes mitigation as a beneficial use and is aware of the need for marketing water for sale or lease where basin

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closures limit new consumptive uses of water. The need for mitigation water in the Lower Clark Fork River basins 76M and 76N are supported by former DNRC Administrator, John Tubb's, May 1, 2009 memorandum which states that the Department will consider the findings of Thompson River Lumber Company's Final Order for Application for Beneficial Water Use Permit No. 76N 30010429 in evaluating adverse effect criteria when depletions from groundwater pumping is calculated to be greater than 35 GPM and 10 AF per year.

21. A portion of the place of use is within the Upper Clark Fork Basin Closure Area. Mitigation in a closed basin must match the rate, location and timing of the surface water depletions resulting in adverse effect. Therefore, historic consumptive use depletions to the Blackfoot River are assessed monthly to determine the mitigation water provided in the closed basin by changing the purpose of this water right. Downstream in open basins, depletions are not assessed monthly due to the hydropower dam in Noxon, MT being able to store water. Table 5 below includes a monthly distribution of diverted and consumed volumes for both mitigation and marketing for mitigation. Distribution of this water was assessed in previous Application to Change a Water Right 76F 30066512 and was adopted by the Applicant. The Applicant will provide monthly distribution information as marketing for mitigation water is sold in the Lower Clark Fork River basin as mitigation timing is not automatically assessed due to the Noxon hydropower facility's ability to store water, but will affect any remaining marketing for mitigation water available on the Blackfoot River.

**Table 5: Monthly Distribution of Mitigation and Marketing for Mitigation Diverted and Consumed Volumes**

<b>Month</b>	<b>% of Total</b>	<b>Total Diverted Volume (AF)</b>	<b>Total Consumed Volume (AF)</b>	<b>Mitigation Diverted (AF)</b>	<b>Mitigation Consumed (AF)</b>	<b>Marketing for Mitigation Diverted (AF)</b>	<b>Marketing for Mitigation Consumed (AF)</b>
January	8.28%	243.54	41.41	33.22	5.65	210.30	35.75
February	8.28%	243.54	41.41	33.22	5.65	210.30	35.75
March	8.28%	243.54	41.41	33.22	5.65	210.30	35.75
April	8.30%	244.13	41.50	33.30	5.66	210.80	35.84
May	8.36%	245.89	41.80	33.54	5.70	212.33	36.10
June	8.40%	247.07	42.00	33.70	5.73	213.34	36.27
July	8.45%	248.54	42.25	33.90	5.76	214.61	36.49
August	8.43%	247.95	42.15	33.82	5.75	214.11	36.40
September	8.36%	245.89	41.80	33.54	5.70	212.33	36.10
October	8.29%	243.83	41.45	33.26	5.65	210.55	35.80
November	8.28%	243.54	41.41	33.22	5.65	210.30	35.75
December	8.28%	243.54	41.41	33.22	5.65	210.30	35.75
<b>Total</b>	<b>100%</b>	<b>2,941</b>	<b>500</b>	<b>401.2</b>	<b>68.2</b>	<b>2,539.8</b>	<b>431.8</b>

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22. The Department finds the purpose of mitigation with a flow rate of 0.56 CFS, 401.2 AF diverted volume and 68.2 AF consumed volume, to be a beneficial use of water. The Department finds the purpose of marketing for mitigation with a flow rate of 3.51 CFS, 2,539.8 AF diverted volume and 431.8 AF consumed volume, to be a beneficial use of water.

### **ADEQUATE DIVERSION**

#### **FINDINGS OF FACT**

23. The Applicant is not required to prove that the proposed means of diversion, construction, and operation of the appropriation are adequate for a change in appropriation right pursuant to §85-2-420, MCA, for marketing for mitigation. See §85-2-402(2)(b)(iii), MCA.

### **POSSESSORY INTEREST**

#### **FINDINGS OF FACT**

24. The Applicant is not required to prove it has a possessory interest in the place of use for a change in appropriation right pursuant to §85-2-420, MCA, for marketing for mitigation. See §85-2-402(2)(d)(iii), MCA.

### **CONCLUSIONS OF LAW**

#### **HISTORIC USE AND ADVERSE EFFECT**

25. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new

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priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator’s right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 411 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).<sup>1</sup>

26. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.<sup>2</sup>

27. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other

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<sup>1</sup> DNRC decisions are available at:

[http://www.dnrc.mt.gov/wrd/water\\_rts/hearing\\_info/hearing\\_orders/hearingorders.asp](http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp)

<sup>2</sup> See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

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water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.<sup>3</sup> A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).<sup>4</sup>

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<sup>3</sup>A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

<sup>4</sup> Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)(“[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.”); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990

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28. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use—developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

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P.2d 46, 55 -57 (Colo.,1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

29. The Department's rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. ARM 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. ARM 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. ARM 36.12.1901 and 1903.

30. Applicant seeks to change existing water rights represented by its Water Right Claims. The "existing water rights" in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department's approval. Analysis of adverse effect in a change to an "existing water right" requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; see also Matter of Clark Fork River Drainage Area, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

31. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of statement of claim no. 76F 30122599 of 2,941 AF diverted volume and 4.07 CFS flow rate with a consumptive use of 500 AF. . (FOF Nos. 12—14)

32. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the



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proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF Nos. 15—17)

### BENEFICIAL USE

33. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(5) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. ARM 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant’s argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)(“The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

34. Applicant proposes to use water for mitigation and marketing for mitigation which are recognized beneficial uses. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence mitigation is a beneficial use and that 401.2 acre-feet of diverted volume and 0.56 CFS flow rate of water requested is the amount needed to sustain the beneficial use. Applicant has proven by a preponderance of the evidence that marketing for mitigation is a beneficial use and

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that 2,539.8 acre-feet of diverted volume and 3.51 CFS flow rate of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos. 18—22)

#### **ADEQUATE MEANS OF DIVERSION**

35. Pursuant to §85-2-402 (2)(b)(iii), MCA, the Applicant is not required to prove that the proposed means of diversion, construction, and operation of the appropriation works are adequate because this application involves a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

#### **POSSESSORY INTEREST**

36. Pursuant to §85-2-402(2)(d)(iii), MCA, the Applicant is not required to prove that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use because this application involves a change in appropriation right pursuant to §85-2-420 MCA for mitigation or marketing for mitigation.

#### **PRELIMINARY DETERMINATION**

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 76F 30148159 should be granted subject to the following. The Applicant will no longer divert 2,941 AF of diverted volume at a flow rate of 4.07 CFS from the historic point of diversion. This flow rate and volume of water is being changed to the new purpose of mitigation in the amounts of 0.56 CFS, 401.2 AF diverted volume and 68.2 AF consumed volume, and to the new purpose of marketing for mitigation in the amounts of 3.51 CFS, 2,539.8 AF diverted volume and 431.8 AF consumed volume. The place of use for mitigation is the NE of Section 19, T18N, R27W, Mineral County. The place of use for marketing for mitigation is from the historical diversion located on the Blackfoot River in the SWNWNW of Section 22, T13N, R18W, Missoula County downstream to the confluence with the Clark Fork River and then downstream to the Noxon Dam hydropower facility located in the S2S2 of Section 33, T26N, R32W, Sanders County. A new point of diversion will be added to the claim for the purpose of mitigation located instream at a point in the SENENE Section 19, T18N, R27W, Mineral County.

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This authorization is subject to the following requirements.

- WATER MARKET REPORT: THE APPROPRIATOR SHALL SUBMIT TO THE DEPARTMENT FORM WM09 WITHIN 30 DAYS OF LEASING OR SELLING ANY PORTION OF WATER UNDER THIS AUTHORIZATION. THE FORM SHALL BE ACCOMPANIED BY A COPY OF THE WATER LEASE AGREEMENT OR DEED EVIDENCING THE SALE OF A PORTION OF THE WATER RIGHT FOR MITIGATION/AQUIFER RECHARGE PURPOSE.
- PROGRESS REPORT ON MARKETING: THE APPROPRIATOR SHALL SUBMIT A PROGRESS REPORT EVERY 5 YEARS FROM THE DATE OF ISSUANCE OF THIS AUTHORIZATION OF THE ACTIVITIES TO DATE TOWARDS DILIGENCE IN MARKETING THE WATER. THE REPORTS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE.

### **NOTICE**

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 18th day of March 2021.

/Original signed by Jim Nave/  
Jim Nave, Regional Manager  
Missoula Regional Office  
Department of Natural Resources and Conservation

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**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 18th day of March 2021, by first class United States mail.

IFG-KAMP LLC  
ATTN: TOM SCHULTZ  
687 W. CANFIELD AVE, SUITE 100  
COEUR D' ALENE, ID 83815-5355

DMS NATURAL RESOURCES LLC  
602 S. FERGUSON AVE., SUITE 2  
BOZEMAN, MT 59718

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Regional Office, (406) 721-4284